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Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.  
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No. \_\_\_\_\_

In The  
Supreme Court of the United States  
October Term, 1989

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CITY VENDING OF MUSKOGEE, INC.

*Petitioner,*

v.

OKLAHOMA TAX COMMISSION

*Respondent.*

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Petition For Writ Of Certiorari To The  
United States Court Of Appeals For The  
Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS FOR REVIEW

Does a state tribunal have the judicial authority to make the decision that the state can tax the flow of goods which the Commerce Clause grants exclusive power to Congress to control?

A. Has any court been granted judicial authority to make the decision to tax said transactions?

B. Does the Oklahoma Tax Commission, sitting as a tribunal, have judicial authority to tax the flow of said goods in commerce after ruling that state law does not grant the commission jurisdiction of questions that arise from the Constitution?

C. Has the decision that the sales to Indian tribes can be taxed been decided by a court of competent jurisdiction thereby depriving the bankruptcy court of jurisdiction to decide the issue?

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## CASE BACKGROUND

The case arises from two orders issued by the Oklahoma Tax Commission (OTC) assessing taxes against City Vending of Muskogee, Inc. (City Vending) in Order Number 85-10-22-40 on October 22, 1985 (attached hereto at pages App. 17-25) and Order Number 86-05-13-02 on May 13, 1986 (attached hereto at pages App. 14-18). The Eastern District Court of Oklahoma, sitting in bankruptcy, dealt with the validity of the orders in Case Number 87-404-C issued December 18, 1987 (attached hereto at pages App. 8-11). The Tenth Circuit judgment on the appeal of the case is Case Number 88-1045 reported as *City Vending of Muskogee v. Oklahoma Tax Com'n*, 898 F. 2d 122 (10 Cir. 1990) (attached hereto at pages App. 1-7).

The circuit court opinion was dated March 14, 1990. A petition for rehearing and suggestion for rehearing en banc was summarily denied on April 18, 1990 (attached hereto at pages App. 26-27). This court has jurisdiction pursuant to 28 U.S.C. § 1254.

The case involves Article I, § 8, Cl. 3 of the Constitution of the United States: "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with Indian tribes."

City Vending was a wholesaler involved in the wholesale of cigarettes to Indian tribes for purpose of resale. The OTC assessed taxes on said sales and City Vending protested. The OTC provided a hearing at which the evidence was uncontroverted that the relevant sales were made to Indian tribes. The OTC ruled that they did not have jurisdiction to hear the defense arising from the Commerce Clause. The OTC then proceeded, without

regard to the Constitution, to hold that state law could be solely relied upon to tax the sales to Indian tribes.

From that point forward, City Vending relied upon the fact that the judgment of a tribunal without jurisdiction was void. City Vending filed a case in federal district court seeking, along with other relief, a declaratory judgment on the issue of voidness. The case was allowed to be dismissed pursuant to 28 U.S.C. § 1341. City Vending then sought a declaratory judgment on the issue of voidness and an appeal under state law in state district court. The OTC obtained an original writ from the Supreme Court of Oklahoma which held that the appeal was untimely and without addressing the issue of declaring whether or not the OTC judgment was void, prohibited further litigation. The Supreme Court of Oklahoma later summarily denied the request of City Vending to assume jurisdiction under a special writ to decide the issue of voidness. No court has ever addressed the issue of voidness prior to the instant case.

A second assessment issued from the OTC to cover sales made during litigation. The issues were stipulated to be the same as in the previous case. The OTC did not address jurisdiction of the Constitutional issue in the second order. The OTC ruled that the fact that the sales were first made to Indian tribes did not exempt the sales from the cigarette tax laws of the state. The order of the OTC granted the taxation and penalties and went on to revoke the wholesale license of City Vending.

Deprived of its license to do business, City Vending was driven into bankruptcy. The debtor-in-possession raised the defense of voidness of the order to the claim of

OTC in bankruptcy. Referral to the bankruptcy court was withdrawn and the district court proceeded with the instant case. The district court had jurisdiction pursuant to 11 U.S.C. § 505.

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### ARGUMENT

It cannot be denied that Congress has exclusive power to regulate commerce with Indian tribes. *U.S. v. Holliday*, 70 U.S. 407, 417 (1865). The decision by the OTC that the sales to Indian tribes could be taxed is therefore erroneous.

Whether or not the decision is erroneous is not an issue of this pleading. The circuit and district courts limited their opinion to the decision that an erroneous opinion, granted with jurisdiction of the subject matter and person, was a final order which must be appealed or its validity could not be questioned. This Court has held that in addition to jurisdiction of the subject matter and person, a court must have been granted the judicial authority or power to make the decision which the judgment contains. *Windsor v. McVeigh*, 93 U.S. 274, 282 (1876). That is the question raised herein. City Vending asserts that Congress has plenary authority over transactions subject to the Commerce Clause, and Congress has not granted judicial authority to any court to decide that said transactions can be taxed.

In *Bigelow v. Forrest*, 76 U.S. 339, 351 (1869) this Court held that an otherwise final order was void because the court had granted relief which it did not have judicial authority to grant. This Court held that the relevant law

did not grant to the court authority to condemn a fee in an estate, and the judgment granting the fee was void. That is the argument of City Vending herein.

The argument that City Vending has against the lower courts' decisions that the OTC decision is merely erroneous is answered by the rationale of this Court in *Ex parte Lange*, 85 U.S. 163, 176 (1873). The OTC has subject matter jurisdiction to apply state laws to taxation, but it was without jurisdiction, and usurped the power vested solely in Congress, by attempting to enact law that it could tax transactions preempted by the Commerce Clause.

This Court has previously addressed an otherwise final decision of a court which attempted to usurp powers vested solely in Congress by the Constitution. *U.S. v. U.S.F. & G Co.*, 309 U.S. 506, 512 (1940). This Court there found that, "The Indian Nations are exempt from suit without congressional authorization." City Vending claims that sales to Indian tribes are exempt from taxes without congressional authorization, and the OTC has been granted no judicial authority to make the decision that the transactions can be taxed.

The case that seems to be most nearly on all fours with the instant case is *Valley v. Northern Fire and Marine Insurance Co.*, 254 U.S. 348 (1920). The Court there held that the relief granted in the judgment was withheld from the court which rendered the opinion by an explicit provision of the law. The subject matter of the suit was the question of the bankruptcy of an insurance company. The bankruptcy law excluded insurance companies from



being declared bankrupt. The judgment was held to be void.

The subject matter of the instant case is the question of the taxation of sales to Indian tribes. The Constitution excludes such sales from taxation. The OTC has been granted no more judicial authority to grant relief taxing such sales than the bankruptcy court in *Vallely* had to declare the insurance company bankrupt.

This Court held that the bankruptcy court in *Vallely* attempted to "enact a law, not execute one" by declaring the insurance company bankrupt when the law exempted insurance companies from bankruptcy. The bankruptcy court decision was declared void because the law did not grant judicial authority to the court to decide that an insurance company could be declared bankrupt.

The Commerce Clause is a bar to any court having judicial authority, without the consent of Congress, to tax sales to Indian tribes. The decision that sales to Indian tribes could be taxed is void because the law does not grant any court the judicial authority to decide that a state can tax said sales.

The Oklahoma law appears to be the same as federal law and the decision to tax the sales to Indian tribes is void under Oklahoma law which also controls the OTC decision. *Glover v. Warner*, 274 P. 867 (Okl. 1929).

Having decided that the statutes do not empower the county court, or any other court, with authority to authorize a mortgage to be executed on a minor ward's land for the primary purpose of paying taxes thereon or tax liens, therefore, any judgment assuming to

authorize such for that particular thing is void, and is subject to collateral attack.

In *State ex rel. Southern Surety Co. v. Armstrong*, 13 P.2d 198 (Okl. 1932) a simple and objective test was set out: "A judgment which the law declares shall not be granted is void" and went on to state, "in addition to jurisdiction of the parties and subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which the judgment assumes to decide." The law does not empower the OTC to decide the constitutional question that sales to Indian tribes can be taxed and the judgment assuming to authorize such is void.

There is a second area of absence of judicial authority for the OTC to decide that the sales to Indian tribes could be taxed. In the first order of the OTC, attached hereto and at page App. 24 herein, the express ruling is made: "That the Oklahoma Tax Commission is without jurisdiction to determine the constitutional questions presented and asserted by the protestant." The ruling goes on to decide that the sales to Indian tribes can be taxed. The constitutional question was by necessity a part of the conclusion that the taxes could be imposed.

The circuit court made the incongruous finding that the OTC did not rule on the constitutional question in the first order. It is difficult to understand how the decision to tax the sales to Indian tribes could be made without deciding the constitutional issue. If the issue was not decided as the circuit court held, the order not only could not be *res judicata*, it could not even arise to the level of a final appealable order. An Oklahoma decision must "dispose of all the issues" to be "construed to rise to the

dignity of a judgment." *Emerson v. Lewis*, 274 P.2d 529, 531 (Okla. 1954).

In the order following the second assessment, the OTC avoided admitting a lack of jurisdiction, and as set out at page App. 15 attached hereto, held that sales to Indian tribes was not a fact that would exempt the sales from taxes by the state. Said decision was rendered by a tribunal which had previously ruled that it did not have jurisdiction to decide that very issue. The earlier decision by the OTC that it did not have jurisdiction to decide that the sales to Indian tribes could be taxed over the constitutional defense was *res judicata*. The second decision was made by a tribunal which did not have competent jurisdiction.

The circuit court decision that the bankruptcy court could not now consider the question appears to be erroneous. If the OTC did not decide the constitutional decision in the first order, not only is their order not final, its "legality" has not been decided by a tribunal of "competent jurisdiction" as the circuit court properly held is required by 11 U.S.C. § 505(a). If the question was decided, as held in the second OTC order, it was done by a tribunal who, by their own admission, was not of "competent jurisdiction" pursuant to said statute. In either event the constitutional issue was never decided by a final order of a tribunal with competent jurisdiction. The lack of resolution of the issue leaves the otherwise final decision open to review in bankruptcy. *In re Century Vault Co.*, 416 F.2d 1035, 1040 (3 Cir. 1969) citing *Pepper v. Litton*, 308 U.S. 295 (1939).

This Court has zealously protected the plenary power of Congress, pursuant to the Commerce Clause, from invasion by a usurpation of authority by the courts. *McCray v. United States*, 195 U.S. 51 (1903). The OTC has defied these teachings by attempting to usurp the power vested in Congress and enact a law that the state can assess taxes in total disregard of the Constitution. The district and circuit courts attempt to reverse the teachings of this Court that although a court has jurisdiction of the person and subject matter, a judgment is void when a tribunal usurps the authority to grant relief that is proscribed by the law.

There is no right more cherished by this Court than the right to a hearing. The right to a hearing was denied by the OTC when the sole defense arising from the Commerce Clause was expressly excluded from consideration. The result is that no tribunal has ruled on the merits of the defense, but liability has been ruled to attach without regard to defense. A lack of jurisdiction of the OTC has consequently been held to be legal excuse to rule without consideration of the merits. This conclusion defies every teaching of this Court arising from both substantive and procedural due process. The issue of taxation of sales to Indian tribes has not been decided by a tribunal of competent jurisdiction, as required by the bankruptcy statute, and should now be heard by the trial court to provide a hearing of the defense.

Respectfully submitted,

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App. 1

PUBLISH  
UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

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CITY VENDING OF MUSKOGEE, )	
INC., )	
Plaintiff - Appellant, )	
v. )	No. 88-1045
THE OKLAHOMA TAX )	
COMMISSION, )	
Defendant - Appellee. )	

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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN  
DISTRICT OF OKLAHOMA  
(D.C. No. 87-404-C)

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Submitted on the briefs:

Jon Tom Staton, Muskogee, Oklahoma, for Plaintiff-Appellant.

Stanley P. Johnson and Lee Anne Wilson, Oklahoma Tax Commission, Oklahoma City, Oklahoma, for Defendant-Appellee.

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Before TACHA, BALDOCK, and BRORBY, Circuit Judges.

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PER CURIAM.

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## App. 2

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff appeals the district court's determination that it lacked jurisdiction to consider plaintiff's claims, asserted in an adversary proceeding in bankruptcy, challenging two tax assessments imposed on plaintiff by the Oklahoma Tax Commission (OTC). The district court held that 28 U.S.C. § 1341 precluded the court's review of the state tax assessments.

Ordinarily, § 1341 will preclude a federal court from considering actions to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." See *Brooks v. Nance*, 801 F.2d 1237, 1240 (10th Cir. 1986) ("for purposes of section 1341, Oklahoma provides an adequate remedy to challenge the lawfulness of its taxing policies and practices under the Oklahoma Cigarette Tax Act"). Section 1341, however, will not preclude the determination of state tax liability where federal courts have jurisdiction under the Bankruptcy Code, 11 U.S.C. § 505. See *Adams v. Indiana*, 795 F.2d 27, 29 (7th Cir. 1986); cf. *Geiger v. City of Southfield (In re Continental Credit Corp.)*, 1 Bankr. 680, 686 (Bankr. N.D. Ill. 1979) (interpreting predecessor statute, § 2(a)(2A) of the Bankruptcy Act).<sup>1</sup>

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<sup>1</sup> Section 2(a)(2A) of the Bankruptcy Act is "substantially the same" as 11 U.S.C § 505. See, e.g., *In re Ishpeming Hotel Co.*,

Section 505 gives federal courts authority to determine, in bankruptcy proceedings, the amount and legality of any tax, 11 U.S.C. § 505(a)(1), except where the amount and legality of the tax has been "contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction" prior to the commencement of bankruptcy proceedings, 11 U.S.C. § 505(a)(2)(A). The question presented in this appeal is whether the Oklahoma tax assessments were "contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction" such that federal review was precluded under § 505. See *Griess v. Colorado*, 841 F.2d 1042, 1047 (10th Cir. 1988) (appellate court may affirm district court's decision based on grounds supported by the record, but upon which the district court did not rely).

The OTC made an initial tax assessment against plaintiff in the amount of approximately \$85,000, asserting plaintiff failed to pay state tax on cigarettes plaintiff sold wholesale to Indian tribes. Plaintiff filed a protest with the OTC, see Okla. Stat. tit. 68, § 221(c), asserting plaintiff's sale of cigarettes to the Indian tribes was exempt from the state cigarette tax under the interstate commerce clause of the United States Constitution. After conducting a hearing, the OTC upheld the assessment, but specifically ruled that, as an administrative agency, it lacked authority to determine plaintiff's constitutional

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(Continued from previous page)

70 Bankr. 629, 632 (Bankr. W.D. Mich. 1986); *Northwest Beverage, Inc. v. Johnson (In re Northwest Beverage, Inc.)*, 46 Bankr. 631, 634 and n.3 (Bankr. N.D. Ill. 1985).



claims. Although entitled to do so, plaintiff did not pursue an appeal of the OTC determination to the Oklahoma Supreme Court. See Okla. Stat. tit. 68, § 225. Instead, plaintiff filed an action in federal court, which was dismissed when plaintiff failed to respond to a motion to dismiss. Plaintiff also filed an untimely action in state court, pursuant to Okla. Stat. tit. 68, § 226, which specifically provides a right of action to challenge a tax assessment as an unlawful burden on interstate commerce. See *Ladd Petroleum Corp. v. Oklahoma Tax Comm'n*, 619 P.2d 602, 604 (Okla. 1980). Finally, plaintiff filed a petition requesting the Oklahoma Supreme Court to exercise original jurisdiction over this matter, which was denied.

Ordinarily, where a taxpayer fails to pursue state remedies available to challenge a tax assessment, federal courts will be precluded from considering challenges to the tax assessment. See *Sacks Bros. Loan Co. v. Cunningham*, 578 F.2d 172, 175 (7th Cir. 1978) (the application of § 1341 turns on whether a state remedy was at some time available to the taxpayer; taxpayer's failure to pursue the remedy properly will not negate the existence of the remedy). In the context of a bankruptcy proceeding, however, a federal court may have jurisdiction to review a state tax assessment where the taxpayer has failed to pursue state remedies. See, e.g., *In re Century Vault Co.*, 416 F.2d 1035, 1041 (3d Cir. 1969) (§ 2(a)(2A)); *Ishpeming Hotel*, 70 Bankr. at 632. We will, therefore, consider the issue of whether the district court had jurisdiction under § 505 to address plaintiff's first tax assessment, despite plaintiff's failure to pursue properly the available state remedies.



Plaintiff argues that, because the OTC held it did not have authority to determine the constitutional issues asserted by plaintiff and because no other court has considered the merits of plaintiff's constitutional challenges, no tribunal of competent jurisdiction has adjudicated the constitutionality of the initial state tax assessment and, therefore, the district court should have addressed this issue under § 505. Defendant, relying solely on § 1341, argues that no state court has addressed plaintiff's constitutional claims solely because plaintiff failed to follow the appropriate state procedures for challenging a tax assessment and, therefore, plaintiff was bound by the OTC determination.

Two policies underlie § 505's grant of federal authority to determine state tax matters. First, § 505 allows the prompt resolution of a debtor's tax liability, where that liability has not yet been determined prior to the bankruptcy proceeding, in the same forum addressing the debtor's overall financial condition. See *City of New York v. Fashion Wear Realty Co. (In re Fashion Wear Realty Co.)*, 14 Bankr. 287, 290 (D.C.N.Y. 1981) (§ 2(a)(2A)). Secondly, § 505 protects "creditors from the dissipation of the estate's assets which could result if the creditors were bound by a tax judgment which the debtor, due to his ailing financial condition, did not contest." *Northwest Beverage*, 46 Bankr. at 635; see also 3 Collier on Bankruptcy § 505.04 (15th ed. 1989). A federal court, therefore, will have jurisdiction under § 505 to consider state tax issues where the debtor has failed to assert any challenge to the assessment prior to commencing bankruptcy proceedings, see, e.g., *Century Vault*, 416 F.2d at 1041 (§ 2(a)(2A)); *Ishpeming Hotel*, 70 Bankr. at 632 (§ 505); *Continental*

*Credit*, 1 Bankr. at 686 (§ 2(a)(2A)), or where the debtor has challenged the assessment through state proceedings which are still pending at the time the bankruptcy petition is filed, *see, e.g., In re Electronic Theatre Restaurants, Inc.*, 85 Bankr. 45, 47 (Bankr. N.D. Ohio 1988); *Lipetzky v. Department of Revenue (In re Lipetzky)*, 64 Bankr. 431, 433-34 (Bankr. D. Mont. 1986); *In re Swann Gasoline Co.*, 46 Bankr. 640, 641-42 (Bankr. E.D. Pa. 1985).

Although the merits of plaintiff's claims were never addressed, the instant appeal does not present the situation where the debtor has failed to assert any challenge to the assessment. Plaintiff vigorously challenged the OTC assessment, albeit unsuccessfully due to his failure to invoke the appropriate state remedies in a timely fashion. Further, the decision upholding this assessment became final under state law prior to the commencement of bankruptcy proceedings. *See Okla. Stat. tit. 68, §§ 221(e) and (g)*. The district court, therefore, correctly held it did not have jurisdiction to consider plaintiff's challenge to the first state tax assessment. *Cf. Northwest Beverage*, 46 Bankr. at 633-35 (where debtor had full evidentiary hearing addressing merits of his claims before the state department of revenue, but was unable, due to financial constraints, to pursue further judicial review of the merits of his claims, the bankruptcy court did not have jurisdiction under § 505 to reconsider state tax questions); *but cf. Tapp v. Fairbanks North Star Borough (In re Tapp)*, 16 Bankr. 315, 319-20 (Bankr. D. Alaska 1981) (in light of legislative history of § 505, state court default judgment will not preclude bankruptcy court from reconsidering state tax question).

## App. 7

On appeal, plaintiff asserts the OTC determination upholding the first tax assessment was void because the OTC did not have jurisdiction to consider the constitutional claims. This argument is unpersuasive because the OTC did not address the constitutional claims contrary to its authority, but rather held it lacked authority to consider those claims. The OTC determination, therefore, was not void. *See generally V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224-25 (10th Cir. 1979) (discussing standard for voidness).

The OTC made a second tax assessment against plaintiff in the amount of approximately \$1,400,000. Plaintiff again filed a protest and, although entitled to a hearing, chose to have the protest considered on the pleadings. *See Okla. Stat. tit. 68, § 221(d)*. In upholding this assessment, the OTC addressed the merits of plaintiff's constitutional claims, ruling that "even assuming that the cigarette sales . . . proposed to be [taxed] were first sold to Indian tribes for resale by such tribes, such fact standing alone does not exempt such sales from the operation of this State's cigarette tax laws." Plaintiff did not pursue further review, and this determination became final under Oklahoma law prior to the commencement of bankruptcy proceedings. *See Okla. Stat. tit. 68, §§ 221(e) and (g)*. Because there was a final adjudication of the merits of plaintiff's claims prior to the commencement of bankruptcy, the district court was correct in determining it lacked jurisdiction to review the second state tax assessment. *See Northwest Beverage*, 46 Bankr. at 635.

The judgment of the United States District Court for the Eastern District of Oklahoma is AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF OKLAHOMA

CITY VENDING OF MUSKOGEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 87-404-C
	)	
THE OKLAHOMA TAX	)	
COMMISSION,	)	
	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT OF DISMISSAL AND  
DENYING PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT

Both parties have moved for summary judgment and agree there is no factual issue in dispute. This court so finds, and pursuant to Rule 56, Federal Rules of Civil Procedure, the court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff, City Vending, received two proposed assessments of taxes, penalty and interest due and owing to the State of Oklahoma upon the sale of unstamped cigarettes. The first assessment, on or about May 31, 1985, was in the amount of \$85,511.83. The second assessment, issued on or about March 19, 1986, for an ensuing period, was in the amount of \$1,486,592.35.

2. City Vending duly filed protests of each of these assessments pursuant to the provisions of 68 O.S. 1981, § 221.

3. In the first protest, City Vending asked for and received a full hearing before the Administrative Law Judge of the Oklahoma Tax Commission; and after such hearing and consideration of the merits of plaintiff's protest, the Tax Commission entered an order denying City Vending's protest and affirming the assessment. Pursuant to the provisions of 68 O.S. 1981, § 225, City Vending duly and timely filed notice of intent to appeal to the Supreme Court of Oklahoma the Tax Commission's ruling in the first protest. City Vending also paid, under protest, the \$83,794.45 assessed and confirmed by the Tax Commission's order, which payment is a jurisdictional prerequisite to appeal under the provisions of Section 225.

4. City Vending did not, however, file a petition in error with the Oklahoma Supreme Court, either within the time limits prescribed by law or otherwise.

5. Instead of perfecting its appeal to the Oklahoma Supreme Court, City Vending filed an action in the United States District Court for the Western District of Oklahoma, seeking a refund of those taxes, penalties and interest, and a declaration by that Court that the assessment was unconstitutional under the provisions of the Commerce Clause of the United States Constitution. Tax Commission moved to dismiss this action in the Western District for lack of subject matter jurisdiction under 28 U.S.C. § 1341 and under the doctrine of comity. On January 16, 1986, City Vending having failed to respond to the motion to dismiss, the District Court for the Western District deemed the same to have been confessed under local court rule No. 14, and entered its order dismissing the case.

6. While Tax Commission's Motion to Dismiss was pending in the Western District, City Vending filed a Petition in Oklahoma County District Court, identical to the earlier federal court complaint. Jurisdiction of the state district court was subsequently prohibited by the Oklahoma Supreme Court as being time-barred.

7. In the second protest, the facts not being in dispute and the issues remaining the same, City Vending did not ask for a formal hearing on its protest, but stood on its pleadings. On or about May 13, 1986, the Tax Commission sitting en banc determined the said protest to be without merit under both state law and rulings of the United States Supreme Court, and denied the protest. No appeal was taken or attempted from this order and it became final thirty days later on June 12, 1986.

8. On October 17, 1986, City Vending filed in the Eastern District a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

9. On February 2, 1987, City Vending commenced an adversary proceeding in the bankruptcy case against the Tax Commission, seeking a declaratory judgment invalidating both of the Tax Commission's two prior assessments, and a return of the tax monies paid.

10. On June 15, 1987, the Bankruptcy Court determined *sua sponte* that this action was not a core proceeding, and entered its order abstaining from further proceedings to allow the parties to pursue this declaratory action in this court.

11. The tax assessments at issue herein are assessments against the plaintiff, City Vending of Muskogee,

Inc., not an Indian tribe. Thus, the court finds there are no legitimate constitutional issues presented in this case concerning Indian sovereignty or the commerce clause of the Constitution.

12. This court finds that there was a plain, speedy and efficient remedy in the state courts of Oklahoma, which were unsuccessfully pursued by plaintiff, and which are binding on it and this court.

#### Conclusions of Law

1. Oklahoma's Uniform Tax Procedure Act, 68 O.S. 1981, §§ 201 et seq., is constitutional and provides adequate and speedy remedies in the state courts for contesting the validity of its provisions. *Cities Service Gas Co. v. Oklahoma Tax Commission*, 565 F.2d 584 (10th Cir. 1981).

2. This court has no jurisdiction to enjoin, suspend or restrain the levy, assessment, or collection of any tax imposed by defendant under the Oklahoma law, where such remedy may be, and has been, pursued by plaintiff in the Oklahoma state courts. 28 U.S.C. 1341.

Accordingly, this court grants defendant's Motion for Summary Judgment to Dismiss, for lack of jurisdiction, and denies plaintiff's Motion for Partial Summary Judgment as moot.

IT IS SO ORDERED this 18th day of December, 1987.

/s/ Frank H. Seay  
Frank H. Seay  
United States District Judge

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BEFORE THE OKLAHOMA TAX COMMISSION  
STATE OF OKLAHOMA

IN THE MATTER OF THE PROTEST )  
OF CITY VENDING OF MUSKOGEE, )  
INC. OF THE ASSESSMENT OF TAX, ) NO. P-86-117  
PENALTY AND INTEREST ON )  
UNSTAMPED CIGARETTE SALES. )

ORDER NO. 86-05-13-02

This matter comes on for consideration before the Oklahoma Tax Commission of the protest of City Vending of Muskogee, Inc., (Protestant) to the proposed March 19, 1986 assessment by the Alcohol and Tobacco Division of the Oklahoma Tax Commission of Taxes, penalty and interest on the sale of unstamped cigarettes.

Protest was duly filed on April 18, 1986. Oral Hearing upon said protest not having been requested, the Commission proceeded without further notice to examine into the merits of said protest, and to make the following findings and Order:

1. That prior to and during the period April 15, 1985 to February 19, 1986, Protestant was engaged in and doing business in Oklahoma as a "wholesaler" of cigarettes as defined in 68 O.S. 1981, §301 et seq.

2. On or before March 19, 1986, pursuant to field audit of Protestant's books and records, the Alcohol and Tobacco Division of the Oklahoma Tax Commission determined and the Commission finds that Protestant did, during the period from April 15, 1985 to February 19, 1986, sell and/or distribute for consumption within this State, 3,796,115 packs of twenty (20) cigarettes each, and



21,940 packs of twenty-five (25) cigarettes each, without stamps affixed thereto as required by law.

3. That the tax due upon such sales is \$688,237.20.

4. That on March 19, 1986, Division proposed the assessment against Protestant in the sum of \$1,376,474.40, said sum being equal to twice the amount of the tax due; and the further sum of \$110,117.95 in interest; for a total proposed assessment of \$1,486,592.35.

5. That Protestant's verified protest states that all of the above sales were made by Protestant to Indian tribes. The Commission makes no finding as to such statement; but specifically finds that all such sales were made by Protestant for resale and consumption in this State.

6. That no evidence has been presented, nor does Protestant claim, that said sales are exempt from taxation under the provisions of either 68 O.S. 1981, §310 (sales in interstate commerce to a person in some other State), or 68 O.S. 1981, §321 (sales to veterans hospitals, veterans houses or the United States).

7. That Protestant requested this Commission to stay proceedings herein pending decision of the Supreme Court of Oklahoma in Cause No. 66219, wherein Protestant made application to the Court to assume original jurisdiction and to declare the sale of cigarettes to Indian tribes for resale and consumption in this State and particularly the sales which are the subject of the protested assessment herein, to be exempt from this State's cigarette stamp tax. On May 6, 1986, the Supreme Court entered its order denying Protestant's application.

## CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has authority and jurisdiction herein to assess and collect the taxes levied under the provisions of Oklahoma's cigarette excise (stamp) tax, and to hear and determine protests in regard thereto. 68 O.S. 1981, §§203, 221; 68 O.S. 1981, §§1301 et seq.

2. Title 68 O.S. 1981, §305(a) specifies the duties to be performed by cigarette wholesalers such as Protestant.

Every wholesaler, jobber, or warehouseman doing business within this State and required to secure a license as provided under Section 304 of this Code shall, upon withdrawal from storage, and before making any sale or distribution for consumption thereof, cause the same to have affixed thereto the stamp or stamps as required by this Article. It shall be the duty of the wholesaler, jobber, or warehouseman to supply and charge to the retailer the necessary stamps to cover any and all drop shipments of cigarettes billed to the retailer or consumer by the wholesaler, jobber, or warehouseman; and the wholesaler, jobber, or warehouseman shall be liable to the Commission to perform this service.

3. Section 305(e) provides in pertinent part as follows:

If, upon examination of invoices or from other investigations, the Commission finds that cigarettes have been sold without stamps affixed as required by this Article, the Commission shall have the power to require such person to pay to the Commission a sum equal to twice the amount of the tax due. If, under the same circumstances, a person is unable to furnish evidence to the Commission of sufficient stamps

purchases to cover unstamped cigarettes purchased by him, the prima facie presumption shall arise that such cigarettes were sold without stamps being affixed thereto.

4. Protestant is a wholesaler doing business within this State and required to secure a cigarette wholesale dealer's license. City Vending has an affirmative duty, under section 305(a), to affix the tax stamps required by law. The failure to comply with this duty subjects the Protestant to the provisions of section 305(c), and the Oklahoma Tax Commission has the jurisdiction to enforce those provisions.

5. That the cigarette sales here in question are not exempt from taxation under the provisions of either 68 O.S. 1981, §310 or §321.

6. That even assuming that the cigarette sales herein proposed to be taxes, were first sold to Indian tribes for resale by such tribes, such fact standing alone does not exempt such sales from the operation of this State's cigarette tax laws. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634 (1976); *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 100 S.Ct. 2069 (1980); *California State Board of Equalization v. Chemehuevi Tribe of Indians*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 289 (1985).

7. That the amounts assessed against the Protestant for the unstamped sale of cigarettes for consumption in this State are correct and in accordance with law; and that therefore the protest should be denied.

IT IS THEREFORE ORDERED by the Oklahoma Tax Commission that the protest of City Vending of Muskogee, Inc., of the assessment dated March 19, 1986 in the

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amount of \$1,376,474.40, plus interest in the amount of \$110,117.95, be and the same is hereby denied, and that said City Vending of Muskogee, Inc. is and shall be liable for and required to pay said sum, together with interest thereon as provided by law; and that the same shall be enforced and collected as provided by law.

Dated MAY 13 1986

OKLAHOMA TAX COMMISSION

/s/ Odie A. Nance

ODIE A. NANCE, CHAIRMAN

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BEFORE THE ADMINISTRATIVE LAW JUDGE OF THE  
OKLAHOMA TAX COMMISSION,  
STATE OF OKLAHOMA

IN THE MATTER OF THE	)	CASE NO.
CIGARETTE EXCISE TAX OF CITY	)	P-85-151
VENDING OF MUSKOGEE, INC.	)	SC-85-002

Order No. 85-10-22-40

FINDINGS, CONCLUSIONS AND  
RECOMMENDATIONS

NOW on this 3rd day of September, 1985, the above styled cause comes on for consideration, pursuant to assignment regularly made to the undersigned Administrative Law Judge by the Oklahoma Tax Commission and hearing had, at which hearing Protestant, City Vending of Muskogee, Inc., appeared by and through its attorney, Jon Tom Staton, and the Alcohol and Tobacco Division of the Oklahoma Tax Commission by and through Robert Jenkins, Attorney for the Oklahoma Tax Commission. Opening statements were made by the parties and exhibits, not itemized herein, were received into evidence. The parties agreed to combine the evidence and testimony of the Show Cause Hearing held June 24, 1985 in view of the fact the issue therein being identical to the issue in the protest lodged by the Protestant. Emery Lloyd Hensley, President of City Vending of Muskogee, Inc., testified on behalf of the Protestant. Closing arguments were then made by each party and the case was submitted.

## STATEMENT OF FACTS

The Protestant, City Vending of Muskogee, Inc., is an Oklahoma corporation and a licensed Oklahoma wholesale cigarette dealer pursuant to the provisions of Article III of Title 68 of the Oklahoma Statutes. On or about May 30, 1985, the Oklahoma Tax Commission, by and through the Commissioners, issued an Order and Notice to Show Cause docketed as "In the Matter of the Cancellation of the Wholesale Cigarette Dealer's License of City Vending of Muskogee, Inc.", File Number SC-85-002, wherein the Protestant was required to appear at the Oklahoma Tax Commission in Oklahoma City on June 24, 1985 at 10:00 a.m. at which time evidence would be presented in regard to the alleged violation and refusal of Protestant to comply with the provisions of Article III of Title 68 of the Oklahoma Statutes wherein the Protestant was alleged to have been selling cigarettes for consumption within the State of Oklahoma without affixing or causing to be affixed thereto cigarette tax stamps as required by the statutes of the State of Oklahoma.

Pursuant to the Notice to Show Cause, the Protestant appeared before Joe Mark ElKouri, Administrative Law Judge, on the 24th day of June, 1985 and a hearing was conducted at which time, following the taking of testimony and evidence, Protestant was allowed until July 5, 1985 to submit additional affidavits and/or documentation with the Court and the General Counsel's Office granted an additional one week in which to respond to said documents and/or affidavits if the General Counsel's office so desired. Subsequent to the filing of the affidavits by the Protestant, the Administrative Law Judge's office received a file from the General Counsel's office setting Protest of City Vending of Muskogee, Inc.,

No. P-85-151, wherein notice from the Administrative Law Judge's office was forwarded to the Protestant dated July 9, 1985 setting the protest hearing down for July 24, 1985. On July 24, 1985, the protest hearing in the matter of the Protest of City Vending of Muskogee, Inc., Docket Number P-85-151, was held at which time the testimony and evidence admitted in the matter of the Order and Notice to Show Cause Hearing of June 24, 1985, docketed as SC-85-002, was combined and made a part of the protest of City Vending of Muskogee, Inc.

The protest at issue involves an assessment dated May 31, 1985 issued by the Alcohol and Tobacco Tax Division of the Oklahoma Tax Commission for cigarette excise taxes, penalty and interest in the total amount of Eighty-five Thousand Five Hundred Eleven Dollars and Eighty-three Cents (\$85,511.83) against City Vending of Muskogee, Inc. This assessment was at the hearing amended to the amount of Eighty-three Thousand Seven Hundred Ninety-four Dollars and Forty-five Cents (\$83,794.45) by agreement of the parties therein reflecting a payment by the Protestant of One Thousand Seven Hundred Seventeen Dollars and Thirty-eight Cents (\$1,717.38) deducting such from the original amount of the assessment of Eighty-five Thousand Five Hundred Eleven Dollars and Eighty-three Cents (\$85,511.83) issued on May 31, 1985. Additional exhibits were offered and received into evidence and arguments by counsels for the Protestant and the General Counsel's office representing the Alcohol and Tobacco Tax Division were made and the case was submitted for a decision.



The facts at issue in the protest of City Vending of Muskogee, Inc. are not in dispute, being that the Protestant has sold cigarettes to Indians and/or Indian tribes for resale within the State of Oklahoma and therein failing to affix thereto cigarette excise tax stamps as required by the laws of the State of Oklahoma.

### ISSUES AND CONTENTIONS

Protestant contends that the sale of the cigarettes to Indian tribes for resale within the State of Oklahoma is exempt under the interstate commerce clause of the United States Constitution, as well as the fact that for the cigarette stamps to be affixed thereto in regard to the sale of those cigarettes to "Indian tribes" would unduly encumber and discriminate against the Protestant. (See Article I, Section 8, Clause 3 of the Constitution of the United States of America.)

It is the contention of the General Counsel's office that the laws of the State of Oklahoma in regard to the cigarette stamp tax are quite specific in that the exemptions are spelled out specifically and that exemption claimed by the Protestant is not found within the provisions of Title 68, Section 301 et seq. of the Oklahoma Statutes.

### APPLICABLE LAW

The Protestant has attempted to clothe himself with constitutional protection throughout the evidence and testimony at the Show Cause Hearing held June 24, 1985, the Protest Hearing held July 24, 1985 and in all briefs



and documents filed until such case was submitted for finding, citing and contending that the actions of the Alcohol and Tobacco Division regarding the assessed cigarette stamp tax and the Notice to Show Cause why the cigarette wholesaler dealer's license should not be revoked and/or cancelled were in fact a violation of interstate commerce and/or an undue burden on interstate commerce.

In view of the fact that the Oklahoma Tax Commission is an administrative agency created under the provisions of Section 102 of Title 68 of the Oklahoma Statutes and granted primary authority and jurisdiction pursuant to Section 203 of Title 68 of the Oklahoma Statutes, the Oklahoma Tax Commission has only that authority and jurisdiction vested in it by acts of the Oklahoma Legislature. The Oklahoma Legislature has provided for administrative hearings within the Oklahoma Tax Commission and has made provisions for appellate review by the Oklahoma Supreme Court of orders, rulings and/or findings of the Oklahoma Tax Commission, and in addition to the administrative proceedings before the Oklahoma Tax Commission, the Legislature has further created a right of the respective taxpayer to avail itself of the Oklahoma District Court when in fact the taxes complained of are alleged to be a burden on interstate commerce or that the collection thereof would be in violation of the acts of the United States Congress or in violation of the provisions of the United States Constitution. (See *Cimarron Industries, Inc. v. Oklahoma Tax Commission*, Okla. 621 P.2d 539 (1980).

The remedy for the contentions and/or assertions of the Protestant put forth within this protest are available to the Protestant pursuant to the provisions of Section

226(c) of Title 68 of the Oklahoma Statutes wherein the law provides a remedy where the taxes complained of are (1) an unlawful burden on interstate commerce, (2) violative to the acts of Congress or the United States Constitution; or (3) in cases where jurisdiction is vested in any of the courts of the United States.

The sole and only issue presented which the Oklahoma Tax Commission has jurisdiction to entertain is whether or not the Protestant has violated the provisions of Section 301 et seq. of Title 68 of the Oklahoma Statutes.

The undisputed facts reflect that the Protestant, an Oklahoma licensed wholesale cigarette dealer did in fact sell cigarettes to individuals, Indians and/or Indian tribes, for consumption within the State of Oklahoma without affixing or causing to be affixed thereto the required cigarette tax stamps. Protestant asserts that the sale of the unstamped cigarettes were to alleged sovereign "Indian tribes" and that as such were exempt from the provisions of Section 305 of Title 68 of the Oklahoma Statutes.

A review of the provisions of the Cigarette Stamp Tax Act, specifically Section 321 of Title 68 of the Oklahoma Statutes recite that,

All cigarettes sold to Veterans Hospitals and state operated domiciliary homes for veterans located in the State of Oklahoma, for distribution or sale to disabled ex-servicemen or disabled ex-servicewomen interned in, or inmates of, such hospitals, or residents of such homes, and all sales to the United States are hereby exempt from the stamp excise tax levied by this article.

In view of the well established rule that tax exemption statutes are to be strictly construed against the person or entity asserting the exemption, the Oklahoma Tax Commission is not privileged to expand the exemption provided by the Legislature as per Section 321, *supra*. (See *Dairy Queen of Oklahoma, Inc. v. Oklahoma Tax Commission*, 238 P.2d 800 (1951); *London Square Village, Inc. v. Oklahoma County Equalization and Excise Board*, 559 P.2d 1224 (1976); and *Phillips Petroleum Company v. Oklahoma Tax Commission*, 542 P.2d 1303, (Okla. 1975).)

In view of the fact that the Protestant, a licensed wholesale cigarette dealer, did in fact sell and distribute cigarettes for consumption within the State of Oklahoma without affixing or causing to be affixed thereto the cigarette tax stamps required by law to parties not recited within the specific provisions of Section 321, *supra*, said action was in direct violation of the provisions of the Oklahoma Cigarette Stamp Tax Act.

The law regarding violation of the provisions of Section 301, et seq. of Title 68 of the Oklahoma Statutes are also expressed in no uncertain terms at Section 324 of Title 68 of the Oklahoma Statutes wherein the section provides:

All manufacturers, *wholesalers*, jobbers, retailers or other persons *selling or distributing* such cigarettes are hereby required to comply with the provisions of the three preceding sections, and the rules and regulations of the Oklahoma Tax Commission as to such sales or distributions, and failure or refusal to so comply shall constitute grounds for revocation of any license issued to such manufacturer, *wholesaler*, jobber,

retailer or other person, by the Oklahoma Tax Commission. (Emphasis added.)

The provisions of Sections 321 and 324 of Title 68 of the Oklahoma Statutes are neither vague nor ambiguous; the intent of the Legislature is plainly expressed in these two statutes and must be followed without further inquiry. (See *In the Matter of Hamm Production Co.*, 671 P.2d 50 (1983); and *State ex. rel Thompson v. Ekberg*, 613 P.2d 466 (1980).)

### CONCLUSION

In view of the above findings of fact and conclusions of law, the Administrative Law Judge concludes as follows:

(1) That the Oklahoma Tax Commission has jurisdiction in this matter.

(2) That the Oklahoma Tax Commission is without jurisdiction to determine the constitutional questions presented and asserted by the Protestant.

(3) That the Protestant has violated the provisions of Section 321 of Title 68 of the Oklahoma Statutes by selling and distributing cigarettes for consumption within the State of Oklahoma without affixing or causing to be affixed thereto the cigarette tax stamps required by law.

(4) That in view of the Protestant's violation of Section 321 of Title 68 of the Oklahoma Statutes, the cigarette wholesale dealers license of the Protestant should be cancelled and revoked pursuant to the provisions of Section 324 of Title 68 of the Oklahoma Statutes.

(5) That the assessment by the Alcohol and Tobacco Tax Division of the Oklahoma Tax Commission dated May 31, 1985 in the amount of Eighty-three Thousand Seven Hundred Ninety-four Dollars and Forty-five Cents (\$83,794.45) is correct and proper and according to the law of the State of Oklahoma. That the cigarette stamp tax, penalty and interest as assessed is due and owing and any additional interest accrued and accruing thereon is due and owing until paid.

(6) That the Protest of City Vending of Muskogee, Inc. should be denied.

#### RECOMMENDATION

In view of the above and foregoing findings and conclusions, the Administrative Law Judge recommends to the Oklahoma Tax Commission that the Protest of City Vending of Muskogee, Inc. be denied, that the assessment of the Alcohol and Tobacco Tax Division of the Oklahoma Tax Commission is correct and proper, that the tax, penalty and interest accrued and accruing thereon is due and owing until paid, and that the cigarette wholesale dealers license of City Vending of Muskogee, Inc. be revoked and/or cancelled.

OKLAHOMA TAX COMMISSION

/s/ Joe Mark Elkouri  
JOE MARK ELKOURI  
Administrative Law Judge

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UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

CITY VENDING OF MUSKOGEE, )	
INC. )	
Plaintiff - Appellant, )	
v. )	No. 88-1045
THE OKLAHOMA TAX )	
COMMISSION, )	
Defendant - Appellee. )	

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ORDER

Filed April 18, 1990

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Before HOLLOWAY, Chief Judge, McKAY, LOGAN,  
SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK,  
BRORBY, EBEL, Circuit Judges.

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This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be

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polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker,  
ROBERT L. HOECKER, Clerk

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